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Nos. 07-1428 & 08-328

IN THE

Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of human resource ("HR") professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

This case is of particular interest to SHRM and its members because human resource professionals are often responsible for monitoring selection procedures for possible disparate impact and, in consultation with industrial psychologists and other personnel professionals, designing and validating appropriate selection procedures for employers across the United States. SHRM and its members wish to maintain the flexibility in existing law that allows employers and other test users significant discretion in deciding how best to address disparate-impact issues: whether to proceed with a given selection procedure subject to completion of the validation process; whether to modify expected uses so as to ensure that scoring and ranking of scores are valid and fair; or whether to substitute a different selection process with a lesser disparate impact on particular groups. Such discretion best advances the user's

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, has made a monetary contribution to the preparation or submission of this brief.

organizational goals as well as furthering compliance with public policy directives.

SUMMARY OF ARGUMENT

In this case, the City of New Haven declined to certify test results for promotional examinations for fire department captains and lieutenants that had an undisputed adverse impact on African-American and Hispanic employees taking those tests. Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), use of tests with such a disparate impact is a presumptive violation of the statute. Employers do not, as a matter of law, violate Title VII when they remove that presumptive violation by declining to use the challenged test results. Moreover, employers are expected, if not required, to engage in ongoing monitoring of results of selection procedures for disparate impact and to consider alternative selection procedures or methods of use with lesser disparate impact. The City of New Haven in this case was acting in conformity with the authoritative guidance of the EEOC and other federal agencies, as set forth in the Uniform Guidelines on Employee Selection Procedures.

Petitioners have no basis in the record for suggesting pretextual racial discrimination. Ongoing monitoring for disparate impact and consideration of alternative approaches with lesser disparate impact are expected, if not required, by the EEOC and reflect responsible employer behavior, not the kind of racial consciousness informing adverse employment decisions that is violative of Title VII.

STATEMENT OF THE CASE

This case involves the issue whether a public employer—here, respondents the City of New Haven, Connecticut and associated city officials—violates its obligations under Title VII of the Civil Rights Act of 1964 and/or the Equal Protection Clause of the Fourteenth Amendment when it declines to certify the results of promotional examinations for fire department supervisors having an adverse impact on African-American and Hispanic employees taking the tests. The tests in question were administered in November and December 2003. Because of an agreement with the New Haven firefighters union, the written result on the examination counted for 60% of the applicant's score and the oral examination counted for 40% of the score.

Forty-one applicants took the Captain examination, of whom 25 were white, 8 African American and 8 Hispanic. Twenty-two passed the examination, of whom 16 were white, 3 African American and 3 Hispanic. Under the "Rule of Three" in the City Charter,[2] each open position had to be filled from the among the three individuals with the highest passing scores. Thus, no African Americans and only two Hispanics would be eligible for promotions to the 7 vacant Captain positions (7 whites and 2 Hispanics were the top 9 scorers).

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[2] *See Kelly v. City of New Haven*, 881 A.2d 978, 993-94 (Conn. 2005) (explaining operation of the Rule of Three). On January 9, 2004, in an earlier stage of the *Kelly* litigation, the state trial court enjoined the City from engaging in its previous practice of rounding scores to their nearest integer, with each rounded score constituting a "rank" for purposes of the Rule of Three. Pet. App. 443a-444a.

Seventy-seven individuals took the Lieutenant examination, of whom 43 were white, 19 African American and 15 Hispanic. Thirty-four passed, of whom 25 were white, 6 African American and 3 Hispanic. Thus, no African Americans or Hispanics would be eligible to be promoted to the 8 vacancies for Lieutenant positions (the top 10 scorers were white).

The New Haven Civil Service Board held hearings between January and March 2004 on the issue of whether to certify the test results. On March 18, 2004, the Board declined to certify the examination results by a 2-2 vote. Petitioners filed this suit, alleging violations of Title VII and the Equal Protection Clause, in the District Court for the District of Connecticut.

On cross-motions for summary judgment, the District Court on September 28, 2006 denied petitioners' motion and granted respondents' motion for summary judgment. 554 F. Supp. 2d 142 (D. Conn. 2006). Evaluating the Title VII claim within the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the trial court assumed *arguendo* that petitioners had made out a *prima facie* case of disparate treatment on account of race and respondents had articulated a legitimate business reason, namely their desire "to comply with the letter and the spirit of Title VII." 554 F. Supp. 2d at 153. Liability then turned on whether petitioners could demonstrate that this articulated reason was a pretext for racial discrimination. The court noted that, despite some dispute over the exact racial breakdown of those passing the Captain's test, petitioners "do not dispute that the results showed a

racially adverse impact on African American candidates for both Lieutenant and Captain positions, as judged by the [Equal Employment Opportunity Commission ("EEOC")] Guidelines.[3] Thus, it is necessarily undisputed that, had minority firefighters challenged the results of the examinations, the City would have been in a position of defending tests that, under applicable Guidelines, presumptively had a disparate racial impact." *Id.* Here, under the EEOC's "four-fifths rule", *see* note 3 *supra,* the pass rate for whites on the 2003 Lieutenant's exam was 60.5%, for African Americans, 31.6%, and for Hispanics, 20%. The pass rate for both African Americans and Hispanics fell under 48%, which would have been the four-fifths score. As for the Captain's exam, "the pass rate for Caucasians was 88%, which is more than double that of minorities and thus by either party's statistic an AIR [or "adverse impact ratio"] far below the four-fifths guideline is yielded." *Id.* at 154.

Petitioners offered essentially two arguments why the City's refusal to certify the test results was pretextual race discrimination. First, they maintained that respondents' failure to complete a

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[3] Presumably, the court was referring to the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1 *et seq*. *See Connecticut v. Teal*, 457 U.S. 440, 444 (1982) ("Petitioners do not contest the District Court's implicit finding that the examination itself resulted in disparate impact under the 'eighty percent rule' of the Uniform Guidelines on Employee Selection Procedures adopted by the Equal Employment Opportunity Commission. Those guidelines provide that a selection rate that 'is less than [80 percent] of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact.'") (citations omitted).

validation study of the results of the 2003 examination showed that the City's refusal was motivated by its concern with racial results rather than the job-relatedness of the test. But this contention, the district court observed, imposed a duty to validate test results not found in the Uniform Guidelines on Employee Selection Procedures ("UGESP" or "Uniform Guidelines"), promulgated by the principal federal agencies with responsibilities in the equal employment opportunity area: "The guidelines do not require or mandate a validity study where an employer decides *against* using a certain selection procedure that manifests this impact." 554 F. Supp. 2d at 155 (emphasis in original).

The trial court also rejected petitioners' second principal contention that respondents did not explore alternatives or await a validity study because they had made a racially motivated decision to set aside the test results. This contention, the court explained, was inconsistent with the Title VII policy to promote voluntary compliance: "Defendants' motivation to avoid making promotions based on a test with racially disparate impact, even in a political context, does not, as a matter of law, constitute discriminatory intent. . . ." *Id.* at 160.

The court held that summary judgment was also appropriate on the equal protection claim because the City employed no racial classification and was not acting for the purpose of harming white applicants in withholding its certification of the test results. *Id.* at 161-62.[4]

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[4] This brief does not deal with petitioners' equal protection claim.

On appeal, the Court of Appeals for the Second Circuit affirmed. The panel (consisting of Judges Pooler, Sack and Sotomayor) initially affirmed by summary order and, after the appeals court denied rehearing *en banc* , 530 F.3d 88 (2d Cir. 2008), issued a *per curiam* decision affirming for the reasons given by the District Court. 530 F.3d 87 (2d Cir. 2008).

ARGUMENT

I. AN EMPLOYER DECLINING TO USE THE RESULTS OF A SELECTION PROCEDURE HAVING AN UNDISPUTED RACIAL DISPARATE IMPACT DOES NOT VIOLATE TITLE VII

The Second Circuit panel made it clear that the rule that governs this case is that an employer cannot, as a matter of law, be held liable under Title VII for refusing to certify the results of a selection procedure found to have an undisputed adverse impact on African Americans or other minority groups. As the appeals court put it, New Haven's Civil Service Board "found itself in the unfortunate position of having no good alternatives." By not certifying the exam results, the Board "was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact[;] its actions were protected." 530 F.3d at 87. The court of appeals' approach flows directly from the text of the statute and its settled interpretation. As early as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), it has been clear that in addition to prohibiting disparate treatment, Title VIII also outlaws practices that, although not the product of intentional

discrimination, erect unnecessary barriers to employment opportunity for minority groups.

The plaintiff's *prima facie* case under this so-called "disparate impact" theory consists simply of showing that the employer uses a selection procedure that has a disparate impact on a racial minority or other Title VII- protected group. Once this *prima facie* case is made, the burden of persuasion shifts to the employer to show that the selection procedure is "job related" and justified by "business necessity": "Once it is . . . shown that the employment standards are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement (has) . . . a manifest relationship to the employment in question.'" *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (quoting *Griggs*, 401 U.S. at 432).[5]

Congress codified the disparate-impact theory of discrimination in the Civil Rights Act of 1991 amendments to Title VII. Now, under § 703(k)(1)(A)) of Title VII, 42 U.S.C. § 2000e-2(k)(1)(A), an employer commits an unlawful employment practice "based on disparate impact" if

> (i) a complaining party demonstrates that [the employer] uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position

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[5] The terms "business necessity," "job related" and "manifest relationship" tend to be used interchangeably. *See Griggs*, 401 U.S. at 431; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988); *e.g.*, *Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361, 382-83 (2d Cir. 2006).

> in question and consistent with business necessity); or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

Rejecting contrary signals from this Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), Congress in § 703(k)(1)(A) squarely placed the burden of persuasion on the employer if the plaintiff is able to demonstrate that a selection procedure has a disparate impact.[6] "If plaintiff meets that burden and no business necessity defense is asserted, plaintiff wins." Rosemary Alito, *Disparate Impact Discrimination under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1022 (1993).

The touchstone of this statutory scheme is disparate impact, which, if shown, establishes a presumptive violation of § 703(k). Once it became clear to the City of New Haven that its promotional examinations for Captain and Lieutenant vacancies had a disparate impact on its African-American and Hispanic employees taking the tests, the options open to the City under Title VII were quite limited. It could try to discount the disparate-impact showing.[7] But as petitioners' own silence on this score

[6] Under § 701(m) of Title VII, 42 U.S.C. § 2000e(m), also a product of the 1991 amendments, "[t]he term 'demonstrates' means meets the burden of production and persuasion."

[7] *Cf.* § 703(k)(1)(B)(ii) ("If the [employer] demonstrates that a specific employment practice does not cause the disparate impact, the [employer] shall not be required to demonstrate that such practice is required by business necessity.").

illustrates, such impeachment would have been exceedingly difficult: the District Court found passing rates for African Americans and Hispanics well below the EEOC's and other federal agencies' 80% mark, even putting aside the fact that no African Americans and only two Hispanics would have been eligible for a promotion under the challenged test results.[8] Given the undisputed disparate impact of the test results, the City really only had two options: (1) certify the test results and attempt to justify its use of the test results, under the content-validity method of empirical validation, in the face of the City Charter's Rule of Three requiring rank order selection and judicial authority banning the use of rounding, *see* note 2 *supra*[9]; or (2) withhold

[8] This Court has accepted lesser disparate-impact showings. *See Griggs*, 401 U.S. at 430 n.6 (pass-rate comparisons based on census statistics and EEOC decisions involving other companies); *Dothard*, 433 U.S. at 329-30 (fail-rate comparisons for height and weight restrictions based on national data). The *Dothard* Court expressly stated: "There is no requirement . . . that a statistical showing of disproportionate impact must always be based on an analysis of the characteristics of actual applicants. . . . The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact." *Id.* at 330-31.

[9] Public employers using the content-validity method of validation have had difficulty justifying the use of ranking and cutoff scores. *See, e.g.*, *Isabel v. City of Memphis*, 404 F.3d 404 (6th Cir. 2005); *Lanning v. S.E. Penn. Transp. Auth.*, 308 F.3d 286 (3d Cir. 2002); *Guardians Ass'n v. Civil Service Comm'n*, 630 F.2d 79 (2d Cir. 1980). Some courts have *required* or approved banding of examination scores and promotion within bands in such circumstances. *See, e.g.*, *Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d 1140 (2d Cir. 1991); *Biondo v. City of Chicago*, 382 F.3d 680 (7th Cir. 2004); *Chicago*

certification of the test results and explore alternative selection procedures that might have less disparate impact. The City opted for the latter—a choice that furthers Title VII objectives and does not violate Title VII.

No decision of this Court or other court (of which we are aware) holds that an employer violates Title VII when it refuses to certify test results having an undisputed disparate impact. Certainly, if the City of New Haven had been sued by African-American and Hispanic employees for making promotions on the basis of the test results at issue, it could have settled the suit without violating Title VII by agreeing to discontinue use of the test results. Nothing in Title VII requires that a lawsuit be brought to reach the same end. Indeed, "Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII." *Local 93, Int'l Ass'n of Firefighters*, 478 U.S. 501, 515 (1986); *see Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)) ("Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII. The statute's 'primary objective' is 'a prophylactic one.'"); *Faragher v. Boca Raton*, 524 U.S. 775, 806 (1998) (statute aims, chiefly, "not to provide redress but to avoid harm"); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764

(continued…)

Firefighters Local 2 v. City of Chicago, 249 F.3d 649 (7th Cir. 2001). These approaches were not available to the City of New Haven because of the strictures of state and local law.

(1998) (with respect to sexual harassment, "for example, Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms"); 29 C.F.R. § 1608.1(b) ("Congress strongly encouraged employers . . . to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity.").

As Justice O'Connor noted in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), "[w]hile employers must have a firm basis for concluding that remedial action is necessary," employers are not required "to prove that they actually discriminated against women or minorities. Employers are 'trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken.'" *Id.* at 652 (O'Connor, J., concurring in the judgment) (emphasis in original & citations omitted).

This case is indeed stronger than the voluntary remedial setting of *Johnson* and other decisions. Here, the City of New Haven was confronted with a presumptive violation if it certified the challenged test results and began to make promotions from the top scorers. It did not violate Title VII by refusing to certify the test results and thus removing the source of the presumptive violation.

II. A "PRETEXT" CASE CANNOT BE BASED ON AN EMPLOYER'S OBLIGATIONS TO MONITOR THE RESULTS OF SELECTION PROCEDURES FOR DISPARATE IMPACT AND TO TAKE APPROPRIATE STEPS TO ADDRESS ANY DISPARATE IMPACT

The central premise of Petitioners' pretext claim is that racial consciousness pervaded the City of New Haven's consideration of whether to certify the challenged test results or, instead, explore alternative selection procedures that might have a lesser disparate impact. However, a showing of pretext cannot be predicated on such facts because employers are expected, if not required, by the Uniform Guidelines for Employees Selection Procedure ("UGESP" or "Uniform Guidelines"), promulgated by the EEOC and other leading federal agencies responsible for enforcement of Title VII and other equal employment laws, to monitor test results for possible racial disparate impact and to take appropriate steps to address such disparate impact.[10]

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[10]Employers acting in good–faith reliance "any written interpretation or opinion" of the EEOC are entitled to immunity under § 713(b) of Title VII, 42 U.S.C. § 2000e-12(b):

> In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [Equal Employment Opportunity] Commission. . . .

A. Petitioner's "Racial Consciousness" Contention Ignores the Employer's Duty to Monitor the Disparate Impact of Employment Tests

The employer's duty to monitor the results of selection procedures for disparate impact derives primarily from the Uniform Guidelines, 29 C.F.R. §§ 1607.1 *et seq.*, cited in *Connecticut v. Teal*, 457 U.S. 440, 444 (1982).[11] Succeeding the EEOC's Guidelines on Employee Selection Procedures, cited in *Griggs*, 401 U.S. at 433 n.9; *Washington v. Davis*, 426 U.S. 229, 247 n.13 (1976), and relied upon in *Albermarle Paper*, 422 U.S. at 431, the Uniform Guidelines were adopted on August 25, 1978 by the EEOC, the Civil Service Commission (now called the Office of Personnel Management), the Department of Justice, and the Department of Labor's Office of Federal Contract Compliance Programs), and went into effect on September 25, 1978. The Uniform Guidelines apply to all "selection procedures which are used as a basis for making employment decisions," 29 C.F.R. § 1607.2(C), including pencil-and-paper tests, assessment centers, interview protocols, work samples, and nonscored evaluations.

The Uniform Guidelines require both public and private employers to monitor and maintain records

[11] The Court has not passed on the binding effect of the Uniform Guidelines. With regard to the EEOC's Guidelines, which preceded the UGESP, it has stated that although "[t]he EEOC Guidelines are not administrative 'regulations' promulgated pursuant to formal procedures established by the Congress . . . they do constitute '(t)he administrative interpretation of [Title VII] by the enforcing agency,' and consequently they are 'entitled to great deference.'" *Albermarle Paper*, 422 U.S. at 431 (quoting *Griggs*, 401 U.S. at 433-34).

on the impact of selection procedures on the various groups protected by Title VII and other federal laws. Under § 1607.4(A), "[e]ach user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group . . . in order to determine compliance with these guidelines." 29 C.F.R. § 1607.4(A). Under § 1607.15(A)(2), users are required to "maintain and have available for each job information on adverse impact of the selection process for that job"; and "[a]dverse impact determinations should be made at least annually for each such group which constitutes at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce." *Id.* § 1607.15(A)(2). Where users have not "maintained data on adverse impact as required by the documentation section of applicable guidelines," then "the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable workforce." *Id.* § 1607.4(D).

This Court previously has taken note of the employer's duty under the Uniform Guidelines to monitor the disparate impact of scored and other selection procedures. In *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 657-58 (1989), the Court stated that "employers falling within the scope of the Uniform Guidelines on Employee Selection

Procedures . . . are required to 'maintain . . . records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group(s)' . . . This includes records concerning 'the individual components of the selection process' where there is a significant disparity in the selection rates of whites and nonwhites." *Id.* (citing 29 C.F.R. §§ 1607.4(A) and (C)).[12]

B. Petitioners' "Racial Consciousness" Contention Ignores the Employer's Duty to Consider Alternative Selection Procedures with Lesser Disparate Impact

In addition to record-keeping obligations, employers have an obligation to consider alternative selection procedures with lesser disparate impact on Title VII-protected groups. The obligation derives from the so-called "pretext" stage of the disparate-impact mode of proof, as recognized by this Court, first in *Albemarle Paper*, 422 U.S. at 425, and codified in the 1991 enactment of § 701(k)(1)(A)(ii). Thus, even where the employer demonstrates that its selection procedure is "job related for the position in

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[12] In *Johnson*, the Court upheld a public agency's plan to consider as one factor the gender of a qualified applicant when making promotions within a job classification in which women had been significantly underrepresented. The plan encouraged coordination with the County Planning Department in compiling data on the percentage of minorities and women in the local labor force actually working in the job classifications: "From the outset, therefore, the Plan sought annually to develop even more refined measures of the underrepresentation in each job category that required attention." 480 U.S. at 635.

question and consistent with business necessity," it is still possible for the complaining party to show that "other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest in efficient and trustworthy worksmanship.'" *Dothard*, 433 U.S. at 329 (citations and internal quotation omitted). In the face of this statutory framework, no responsible employer faced with test results having an undisputed disparate impact would limit itself to the formal validation effort underway for the selection procedure in question without at the same time considering alternative ways of reaching the same organizational goals but with lesser disparate impact.

The Uniform Guidelines oblige all test users to engage in the consideration of alternative selection procedures, including "suitable alternative methods of using the selection procedure," with lesser disparate impact:

> Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact. Accordingly, whenever a validity study is called for by these guidelines, the user should include, as part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating

> them in accord with these guidelines.... Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines.

29 C.F.R. § 1607.3(B). [13]

Given this integrated framework of statutory and administrative obligations imposed on employers as test users, petitioners have no basis to argue that mere "racial consciousness" establishes pretext—in other words, that a Title VII violation can be based on evidence that City of New Haven was engaged in monitoring test results for possible adverse impact on its African-American and Hispanic employee-applicants and that it declined to certify the challenged test results because of evidence of such impact and the need to consider alternative procedures or uses of selection procedures, *see* note 8 *supra,* that might have a lesser racial impact.

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[13] Industrial psychologists are increasingly urging greater consideration of alternative procedures and methods of using procedures. *See, e.g.*, Robert E. Ployhart & Brian C. Holtz, *The Diversity-Validity Dilemma: Strategies for Reducing Racioethnic and Sex Subgroup Differences and Adverse Impact in Selection*, 61 PERSONNEL PSYCH. 153 (Spring 2008); David A. Kravitz, *The Diversity-Validity Dilemma: Beyond Selection – The Role of Affirmative Action,* 61 PERSONNEL PSYCH. 173 (Spring 2008); Transcript of Meeting of May 16, 2007 of U.S. Equal Employment Opportunity Comm'n, at 36 ff, *available at* www.eeoc.gov/abouteeoc/meetings/5-16-07/transcript.html (presentations of Drs. Outtz and Lundquist).

III. TITLE VII ALLOWS EMPLOYERS CONSIDERABLE FLEXIBILITY IN DECIDING HOW BEST TO ADDRESS DISPARATE-IMPACT ISSUES

Title VII and authoritative agency guidance accord employers and other test users significant discretion in deciding how best to address disparate-impact issues: whether to proceed with a given selection procedure subject to completion of a validation effort; whether to modify expected uses so as to ensure that the scoring and ranking of scores are valid and fair; or whether to substitute a different selection process with a lesser disparate impact on particular groups.

A. Employers are Not Required to Conduct or Complete Validation Studies

Petitioners make much of the fact that respondents commenced a validation effort in the initial design of the challenged examinations, suggesting that the failure to complete that effort reflects pretextual racial discrimination. This contention betrays a misunderstanding of applicable legal requirements and sound professional practice.

Nothing in the text of Title VII, the decisions of this Court or the authoritative administrative guidance of the EEOC and other federal agencies requires a formal empirical validation in every case or the completion of a validation effort once undertaken.[14] First, the Uniform Guidelines "apply

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[14] This Court's "cases make it clear that employers are not required, even when defending standardized or objective tests, to introduce formal 'validation studies' showing that particular criteria predict actual on-the-job performance." *Watson*, 487 U.S. at 998 (O'Connor, J., concurring). Lower-court decisions also recognize "formal validation may be either functionally

only to selection procedures which are *used* as a basis for making employment decisions." 29 C.F.R. § 1607.2(B) (emphasis supplied). It is "[t]he *use* of any selection procedure which has an adverse impact . . . [that] will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 of this part . . . are satisfied." *Id.* § 1607.3(A) (emphasis supplied). Section 6 expressly states that "'[a] user may choose to utilize alternative selection procedures in order to eliminate adverse impact or as part of an affirmative action program." *Id.* § 1607.6(A) (emphasis supplied). In this case, the challenged test results which had an adverse impact were simply not used; and hence there was no obligation to begin or complete a validation study.

Second, by refusing to certify the test results and thus removing the source of the disparate impact, there was no obligation even under the Uniform Guidelines to pursue any validation effort. The UGESP makes clear that disparate impact is an essential trigger: "These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results." 29 C.F.R. § 1607.1.

That the City of New Haven commenced a formal validation effort in initially deciding which selection procedure to use but did not complete that effort after learning of the disparate impact of the test results,

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(continued…)

impossible or inadequate as a measure of the test's job relatedness." *Gulino*, 460 F.3d at 385-86.

cannot be evidence of pretextual discrimination. This is because the City was required by the Uniform Guidelines to demonstrate the validity of *both* the initial design of the tests and their ultimate use in making employment decisions. The City's reliance on expert assistance in the initial design of an employment test was essential because the critical first steps in fashioning a job-related promotions test are an empirical analysis of the jobs for which the tests will be used (called a "job analysis") and the selection of test instruments that themselves constitute "a representative sample of the work behavior(s), or a representative sample of a knowledge, skill, or ability as used as a part of a work behavior and necessary for that behavior. . . ." 29 C.F.R. § 1607.15(C)(5).[15] But the City was not locked into one path—completing the validation effort—because, under the Uniform Guidelines, it still had to justify how it would *use* the test results having an adverse disparate impact:

> The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. *Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines*.

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[15] The City in this case employed a content-validity strategy authorized under the UGESP, 29 C.F.R. § 1607.15(C).

Id. § 1607.5(G) (emphasis supplied).[16]

B. Employers are not Engaged in Pretextual Discrimination When they Decline to Certify Test Results Rather than Engage in a Full-Blown Validation Effort

It was open to the City, and not evidence of pretextual discrimination, to avoid the burdens and legal uncertainty of attempting empirical validation for any particular method of use of the test results, especially when state and local law, *see* note 2 *supra*, constrained how those results could be used.

Completion of a validation study would not necessarily have provided immunity from liability. "Validation studies 'are by their nature difficult, expensive, time consuming and rarely, if ever, free of error.'" *Ass'n of Mexican-Am. Educators v. California*, 231 F.3d 572, 587 (9th Cir. 2000) (citations omitted). And they are especially difficult, expensive and error-prone where state civil service and local laws, *see* note 2 *supra*, require use of scored written examinations for promotion decisions and, in this case, limit the employer to making selections from the top three test scorers without regard to whether differences in scores reflect real differences in underlying abilities.

As previous decisions indicate, the use of rank ordering was a particular susceptible aspect of the challenged selection procedure in this case. For example:

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[16] Record-keeping requirements on the methods of use, under the content-validity strategy, are found in 29 C.F.R. § 1607.15(C)(7).

- In *Guardians Association v. Civil Service Commission*, 630 F.2d 79, 89 (2d Cir. 1980), an extensive formal content-validity study was held not to justify the New York police department's use of rank ordering in making hiring decisions.
- In *Isabel v. City of Memphis*, 404 F.3d 404, 413-15 (6th Cir. 2004), the appeals court ruled that the Memphis police department had not sufficiently justified the cut-off score it used, even though it had conducted an extensive validation study, and lowered the cutoff score to reduce disparate impact.
- In *Lanning v. Southeastern Pennsylvania Transportation Authority (SEPTA)*, 181 F.3d 478 (3d Cir. 1999), SEPTA had utilized a physical capacity exam for selecting transit police officers after extensive validation studies. The district court accepted expert testimony that the aerobic fitness requirements were "readily justifiable," but the Third Circuit determined that the cutoff scores might have been "unnecessarily high," and remanded for a more searching review of whether the validation study was valid. *Id.* at 492-93. While the district court ultimately ruled in SEPTA's favor on remand (*Lanning v. Southeastern Transp. Authority*, 2000 WL 1790125 (E.D. Pa. Dec 7, 2000), *aff'd,* 308 F.3d 286 (3d Cir. 2002)), this outcome required three more years of litigation.

Petitioners simply have no basis in the record for their contention that the City of New Haven's concern with the undisputed disparate impact of the

challenged examinations and the likely difficulty it would face in justifying use of rank ordering and selections drawn exclusively from the top test scorers without banding was a form of pretextual racial discrimination violative of Title VII.

IV. AN EMPLOYER'S REFUSAL TO CERTIFY TEST RESULTS DOES NOT CONSTITUTE "RACE NORMING" IN VIOLATION OF SECTION 703(l) OF TITLE VII

Petitioners also claim that the City of New Haven's refusal to certify the challenged test results violates § 703(l) of Title VII, which provides that employers may not, "in connection with the selection or referral of applicants or candidates for employment or promotion, . . . adjust the scores of, use different scores for, or otherwise alter the results of, employment related tests on the basis of race. . . ." 42 U.S.C. § 2000e-2(l). Even if this argument had been properly preserved, it is without merit. For several reasons, the provision simply does not apply in this case. In the first place, § 703(l) applies only in the case of "employment related tests"; the tests in question have not been shown by petitioners to be "employment related tests" and they certainly have not demonstrated that the use of rank ordering would be in conformity with the Uniform Guidelines. Second, it is doubtful there was any "use" of test scores or "alter[ation]" of test results when the City of New Haven simply declined to certify test results. Finally, the argument fails to address the fact that the provision seeks principally to reach different cutoff scores for different races and racial readjustment of scores—what is often referred to as "race norming." No such conduct is alleged to have

occurred in this case. *See Hayden v. County of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999) ("The legislative history of the statute . . . confirms that it intended to prohibit 'race norming' and other methods of using different cut-offs for different races or altering scores based on race. In the case before us, the 1994 exam was scored in the same manner for all applicants; no differential cutoffs were employed. Thus, appellants fail to adequately allege a claim under § [703(l)].") (emphasis in original & citations omitted).

CONCLUSION

The Court should affirm the judgment of the Second Circuit.

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